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No. 81-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNA WILLIAMS,

Appellant,

—v.—

WILLIAM WILLIAMS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS

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QUESTIONS PRESENTED

Can the State of New Hampshire, consistent with federal due process constraints, award a divorce to a domiciliary husband, and restore to him marital property which he brought to the marriage, or purchased, and which property is present in New Hampshire, if the non-resident, non-appearing spouse has "regular" and "substantial" contacts with the state, and does not contest receiving two (2) orders to appear, but tactical purposes elects to disregard the New Hampshire action and proceed in a subsequently commenced divorce in New York?

DECISION OF THE COURT BELOW

The opinion of the Supreme Court of the State of New Hampshire is reported in 433 A.2d 1316 (1981), and also appears in the appendix to appellant's Jurisdictional Statement at pages A-11 through A-22.

SUMMARY OF ARGUMENTS PRESENTED

I. Appellant failed to present her federal claim in a timely and proper fashion below. Where the record is silent on the claim which appellant now raises, the burden is upon her to demonstrate that she properly presented the claim to the lower courts. Since the appellant had ample opportunity to raise her federal claim, and since the court's construction of the statute of which she complains is not "novel," she cannot meet this burden and her appeal should therefore be dismissed.

II. Where this Court has concluded that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny" and that ". . . [t]o the extent that prior decisions are inconsistent with this standard, they are overruled,"

Shaffer v. Heitner, 433 U.S. 186 at 212(1977), (emphasis supplied) and where, in light of such standard the appellant was found to have had actual notice of the New Hampshire proceedings and "regular" and "substantial" contacts with New Hampshire arising out of the parties' marital relation in that State, the New Hampshire state courts did not violate federal due process standards in asserting jurisdiction in this case. Accordingly, no substantial federal issue is presented and appellant's appeal should therefore be dismissed and/or her Petition for Certiorari denied.

III. The decision below is fair, gave full consideration to the issues, and should be affirmed. Appellee is a seventy year old, life-long domiciliary of New Hampshire who had no significant contact with New York. Appellee shared his New Hampshire

property with the appellant, while she did not reciprocate with her New York and Florida property. Now, appellant, in a subsequently commenced New York divorce action, is seeking all of her solely held New York and Florida property and, in addition, seeks one-half of appellee's New Hampshire property. Appellant has "tied up" appellee's life savings by writing to banks and transfer agents and threatening them with suit for "actual and punitive" damages if they release proceeds to appellee. As a result, appellee has been relying on a seaman's pension to live, while in contrast, none of appellant's assets have been "tied up." New Hampshire is the proper forum to have heard this cause because the property at issue is present in New Hampshire and both parties had significant contacts here. The New Hampshire court awarded only

property to appellee in which he had sole equity. In view of the actions pending in New York against appellee, if the New Hampshire Supreme Court decision is not affirmed, further litigation and appeals will result, thereby further depriving the appellee of his property and depriving him of a forum in which to litigate his interest in his New Hampshire home.

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In The

Supreme Court of the United States

October Term, 1981

No.81-1028

ANNA WILLIAMS, Appellant

v.

WILLIAM WILLIAMS, Appellee

On appeal from the Supreme Court
of the State of New Hampshire

Appellee William William's
Motion to Dismiss

Appellee William Williams respectfully moves to dismiss on the grounds that the alleged invalidity of New Hampshire RSA 458:5 III was not timely and properly presented and was not passed upon by the New Hampshire Supreme Court.

Appellee further moves to dismiss on the grounds that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

The Facts

The following facts appear as a matter of record. Such facts exist as a matter of law, and were found by the trial court below. These facts were uncontested by the appellant, either by personal affadavit, or during the trial court's rehearing below. In addition, the following facts were affirmed by the New Hampshire Supreme Court upon appeal:

A. The appellant, Anna Williams, first moved to the parties' marital domicile in New Castle, New Hampshire, in September of 1971.

B. The appellant spent a cumulative period of two and one-half (2 1/2) years with the appellee over the last eight (8) years, while residing at the parties' marital domicile in New Castle, New Hampshire.

C. The parties lived together in New Hampshire as man and wife.

D. The appellant, Anna Williams, is of independent means, resources and wealth; that the appellant has assets in an amount far in excess of appellee's net worth, and that the appellant had assets at the time of the parties' marriage in excess of one million dollars ($1,000,000.00).

E. The appellant, Anna Williams, has record title to: real property; bank accounts; an automobile; and stocks and bonds, all of which property is physically present in New Hampshire, but that appellee has sole equity in this property.

F. All of the New Hampshire marital property was purchased by the appellee (with the exception of 101 shares of Occidental Petroleum--which shares were ordered returned to the appellant).

G. Only marital property deemed physically present in New Hampshire was awarded to the appellee.

H. New Castle, New Hampshire is the site of the parties' last marital domicile.

I. The appellee, William Williams, was induced to transfer all of his New Hampshire property into the appellant's name, upon the appellant's representation that she would transfer her solely held assets (her real and other property located in New York and Florida) into the parties' names jointly, which she did not do.[1]

The record further reflects that appellee, William Williams, is a life-long New Hampshire domiciliary. For a period of twenty (20) years, however, appellee was a

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1. These findings appear in the appendix to appellant's jurisdictional statement at p. A-31.

merchant marine sea captain (employed by Isthmian Lines, Inc., New York, New York), where as part of appellee's employment appellee entered and left the country through the port of New York. This was appellee's primary connection with the State of New York.

The parties met in the summer of 1965 when appellee was returning from sea to his home in New Castle, New Hampshire, and at the same time, appellant was visiting her children of a prior marriage who were attending their regular summer camp in Ossipee, New Hampshire.

After the parties' initial meeting in New Hampshire, appellant regularly wrote, telephoned and visited appellee at this home in New Castle, New Hampshire.

In 1969, when appellee was about to return to sea, the parties were married in New York. Appellee then put out to sea, spending only two (2) months in New York between 1969 and 1971.

In 1971, as a matter of record, upon appellee's return from sea, both parties moved to New Castle, New Hampshire.

At this time, appellee transferred the real property which he had owned for several years (property facing the sea, as appellee's wish was to retire in a home facing the sea) to appellant. Appellant took out a mortgage to build a home on this real property (and appellee alone has made every mortgage payment).

Appellee transferred his stocks which he brought to the marriage to appellant, and appellee transferred his car to appellant.

During the parties' marriage, appellant, Anna Williams, would leave New Hampshire for months at a time, dividing her time between her property in Southampton (Long Island), New York, Florida and parts unknown.

During the parties' marriage, appellant's counsel advised appellee that appellee should transfer all of his property to appellant, and that she, likewise, would

transfer all of her property to appellee, as "this is the only way to be married."

In fact, as the record discloses, though appellee transferred all of his New Hampshire property to the appellant, she did not reciprocate with her New York and Florida property.

Because the appellant would not share her substantial New York and Florida property with appellee, and because of appellant's regular and prolonged sojourns away from the marital home in New Hampshire, appellee brought a libel for divorce in New Hampshire in 1979, seeking the return of the assets which appellee had transferred to appellant during the marriage.

Prior Proceedings

The appellee, William Williams, brought a libel for divorce in the Rockingham County Superior Court, in and for the State of New Hampshire, on the first day of October, 1979. Appellee sought a divorce from the bonds of matrimony solely on the grounds of

irreconcilable differences. In addition, he sought only a return to the parties' "financial status quo", and general relief.

The appellee forwarded the divorce libel to the Sheriff of Suffolk County, State of New York, for service on the appellant at her Southampton residence.

The New York Sheriff gave a non est return to the New Hampshire process.

On October 29, 1979, less than three (3) weeks after the New York Sheriff attempted to serve the appellant with the New Hampshire divorce libel (a full ten (10) years after the parties' marriage), the appellant brought her action for divorce in New York seeking a divorce on the grounds of "cruel and inhuman treatment." Further, in sharp contrast to the return to the "status quo" sought by appellee, appellant sought "alimony," "attorney's fees," "costs," "disbursements," "exclusive use of the Southampton property;" and, in an amended complaint, upon the allegation that appellee had

"converted" the New Hampshire marital property, appellant is currently seeking one hundred thousand dollars ($100,000.00) in punitive damages. (Appellant's New York divorce action has been stayed pending the outcome of this Honorable Court's decision.)

After two (2) unsuccessful attempts at serving the appellant in hand in New York with the New Hampshire divorce process, the New Hampshire Superior Court ordered that the appellant was to be served by publication and certified mail. The New Hampshire notice was duly published in appellant's New York county in accordance with New Hampshire law (N.H. RSA 458:9[2] and Superior Court Rule 146[3]), she was sent a copy of the New Hampshire divorce libel[4] by certified mail and appellant was ordered to appear in the

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2. The text of RSA 458:9 and RSA 458:5 appears in the appendix, p. A-1.

3. Text appears in appendix, p. A-2-3.

4. See appendix to appellant's jurisdictional statement, pp. A-68-9.

Rockingham County Superior Court on the first Tuesday of April, 1980, to show cause why the divorce should not be granted.

Although the appellant personally signed the return receipt[5], she did not appear as ordered, either specially to contest the jurisdiction of the New Hampshire court, or generally. Because there was marital property at stake in New Hampshire, when the appellant did not appear as ordered the trial court ordered that a second notice of a contested hearing was to be sent to the appellant, and a new contested hearing date was scheduled. Again, the appellant did not appear.

Subsequently, appellee submitted his request for findings of fact[6] and rulings of law[7] and his proposed decree[8]. The decree

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5. See appendix, p. A-4.

6. See appellant's Jurisdictional Statement pp. A-31-37.

7. See appellant's Jurisdictional Statement pp. A-37-39.

8. See appellant's Jurisdictional Statement pp. A-24-30.

acted in the alternative--as an order personally directing the appellant to reconvey property to appellee, or in the event appellant failed or refused to so convey the property, the decree acted in rem or quasi-in-rem against the property itself.

Appellee's request for findings of fact, rulings of law and proposed decree were granted and forwarded to the appellant in Southampton, New York.

Two (2) days prior to the expiration of the appeal period, appellant appeared specially and filed an ex parte motion to stay and set aside the decree of divorce.

On the 25th day of July, 1980, a hearing on that motion was held in the New Hampshire trial court. Both sides were heard orally, and the issues, including the application of NH RSA 458:5 III (Jurisdiction to Grant Divorce) were briefed.

As a result of that hearing, appellant's Motion to Set Aside Decree of Divorce was denied. From this ruling, appellant

appealed to the New Hampshire Supreme Court only that part of the New Hampshire divorce decree purporting to exercise personal jurisdiction over Anna Williams.

By opinion dated the tenth day of August, 1981, the New Hampshire Supreme Court, per Justice Douglas, affirmed the judgment of the trial court.

Appellant filed her timely Motion for Rehearing before the New Hampshire Supreme Court, which motion was denied without opinion. Appellant's Motion for Stay of Mandate was granted for fifteen (15) days pending appellant's appeal to this Honorable Court. Justice Brennan, by Order dated the sixteenth day of September, 1981, granted a temporary stay of the New Hampshire Supreme Court mandate, and, by Order dated the 29th day of September, 1981, Justice Brennan continued the stay during the pendency of this Honorable Court's action on the Jurisdictional Statement.

On the first day of December, 1981, appellant filed her Jurisdictional Statement, to which Jurisdictional Statement appellee respectfully submits the within Motion to Dismiss.

ARGUMENT

I. The appeal should be dismissed for lack of jurisdiction because the federal claim now made was not presented in a timely and proper fashion in the courts below and has not been passed upon by the New Hampshire Supreme Court.

In order for the appellate jurisdiction of this Honorable Court to be properly invoked, the statutory requirements of 28 USC §1257(2)[9] must be met. In enacting 28 USC §1257, Congress expressly intended, pursuant to its authority under Article III of the United States Constitution, to so limit the appellate jurisdiction of this Court. See Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

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9. The text of 28 U.S.C. §1257(2) appears in the appendix at p. A-5.

Accordingly, for 28 USC §1257(2) to obtain, the federal question for which appellant seeks review must have been "properly and timely" raised in the state court in accordance with state practice. Cardinale v. Louisiana, 394 U.S. 437(1969); In re Lamkin, 355, U.S. 59(1957); Ferguson v. Georgia, 365 U.S. 570, 572(1961). As Justice Harlan succinctly stated, "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." Amalgamated Food Employees Union vs. Logan Valley Plaza, 391 U.S. 308,334(1968)(dissent). (Emphasis supplied).

In this case, despite numerous opportunities to do so, at no point prior to the final judgment of the Supreme Court of New Hampshire did the appellant present the issue which in this Court[10] she frames as

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10. See appellant's Jurisdictional Statement, p. ii.

follows:

> 1. Are New Hampshire statutes RSA 458:5 and RSA 458:9, construed by the Supreme Court of New Hampshire, in an action for divorce and division of marital property to yield in personam jurisdiction over a non-resident, nonappearing spouse not served in the forum state, impermissably vague and thereby violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution? (Emphasis supplied).

Under New Hampshire practice, appellant might have raised the issue of "void for vagueness" in her special plea at the time of filing her special appearance (the right to appear specially having been long recognized in New Hampshire practice).

Appellant might also have preserved this issue by having the question certified to the New Hampshire Supreme Court by the trial court, or, appellant could have raised the issue by filing a bill of exceptions. Indeed, under New Hampshire's liberal practice, appellant could have had this issue reviewed by the New Hampshire Supreme Court by simply having argued at any point on the

record[11] that RSA 458:5 III was "void for vagueness." However, she did not do so.[12]

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11. The relevant part of New Hampshire Supreme Court Rule 16 reads:

> (3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated--
> (a) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his notice of appeal, but only if he has presented a record that is sufficient for the supreme court to decide the the questions presented. (emphasis supplied).

12. At each stage in the proceedings below, appellant was presented with an opportunity to raise this federal issue. When appellant finally filed her special appearance (three (3) months after she had first been ordered to appear) she argued that she had "insufficient contacts" with New Hampshire to support a division of marital property in New Hampshire. When appellant argued orally before the trial court, she openly admitted on the record that her retained New York counsel had advised "that she must never appear in the New Hampshire matter" (hearing transcript, p. 2), even though appellant admitted (Footnote continued on next page.)

(Footnote continued from preceding page.)

that she had received two (2) notices to appear from the Rockingham Superior Court. Appellant also stated for the record that she was told that she must, instead of appearing in New Hampshire, proceed in New York and "race for jurisdiction" (Hearing Transcript, p.2), which race she could not win if she appeared in New Hampshire. Appellant then moved to set aside the New Hampshire decree, not on the ground that the New Hampshire divorce statute was "void for vagueness," but on the ground that she had suffered "accident, mistake and misfortune . . . largely due to the advice of the New York lawyers." (Hearing Transcript, p.8). This motion was denied. Appellant had yet to challenge RSA 458:5 III.

Appellant then filed a brief at the trial court stage and here appellant conceded that RSA 458:5 III was controlling, and, in a lengthy analysis of RSA 458:5 III, appellant conceded that RSA 458:5 III is a sufficient basis for the exercise of in personam jurisdiction over absent defendant's if they are absent domiciliaries, but appellant concluded in her trial court brief only that appellant didn't, as a factual matter, come within the reach of the statute because she had "insufficient contact" with New Hampshire--not that the statute is "void for vagueness."

Appellee expressly argued in his trial court brief that RSA 458:5 III was the controlling statutory authority. Appellee cited RSA 458:5 III to the trial

(Footnote continued on next page.)

Appended hereto are the Specific Questions Presented for Review to the New Hampshire Supreme Court by the appellant in her brief to that court.[13]

This Honorable Court's attention is respectfully directed to question number four (4) raised by the appellant before the New Hampshire Supreme Court, appearing as follows:

(Footnote continued from preceding page.)

court as the statutory basis for the division of the marital property, and appellee further cited Duford v. Duford, 119 N.H. 515, 403 A.2d 431 (1979) (as appellee had done at every stage of the proceedings) as the controlling judicial construction of RSA 458:5 III.

Still, when appellant framed her issues for presentation to the New Hampshire Supreme Court, appellant did not challenge the validity of RSA 458:5 III, either on its face, or as construed by the New Hampshire Supreme Court. Appellant's failure to challenge the validity of RSA 458:5 III is the reason why the New Hampshire Supreme Court opinion in this case is silent on the issue.

13. See appendix, pp. A-6-8.

> 4. If RSA 510:4 does not confer in personam jurisdiction over libelee in this case, does RSA 458:5 in conjunction with RSA 458:9 confer in personam jurisdiction over libelee, a non-resident, non-domiciliary of New Hampshire, who was served by publication and certified mail in New York and who did not appear generally in person or by attorney in the action and whose property was not attached?

This was the question presented by appellant to the New Hampshire Supreme Court for review concerning RSA 458:5 III. The New Hampshire Supreme Court answered the question as framed by the appellant in the affirmative, as had the trial court.

A review of the opinion[14] rendered in this case discloses that the issue of RSA 458:5 III being invalid, or "void for vagueness", was not treated by the New Hampshire Supreme Court.

This court has stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that

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14. The opinion below is published at 433 A.2d 1316(1981).

the omission was due to want of a proper presentation in the state courts, unless the aggreived party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 at 582(1969). In other words, the burden is upon the appellant to show that she properly and timely presented the issue of RSA 458:5 III being invalid at the state court level.[15]

Appellant first raised the issue of the constitutional invalidity of RSA 458:5 III in her timely Petition for Rehearing before the New Hampshire Supreme Court. Appellant's petition was denied without opinion. The general rule is that an initial attempt to raise a federal question after judgment by

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15. Compare United States Supreme Court Rule 15.1.(g), requiring that "[t]he statement of the case shall also specify the stage in proceedings (both in the court of the first instance and in the appellate court) at which the questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed upon by the court.

the highest state court, upon a petition for rehearing, comes too late, unless the state court actually entertains, and decides, the federal question. Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 at 476(1975).

One of the few exceptions to this general rule is the instance where the ruling of the highest state court could not have been anticipated, and a petition for rehearing presented the first opportunity for raising the (federal) claim. Herndon v. Georgia, 295 U.S. 441(1935). Appellant argues that she fits within this judicial exception to the general rule.[16]

Thus, the issue before this Honorable Court (the resolution of which will be dispositive of the question of whether or not jurisdiction for an appeal exists) is whether the appellant should have reasonably anticipated the ruling which she attacks in

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16. Appellant's Jurisdictional Statement, p. ii.

this Court; if the answer is in the affirmative, this exception is unavailable to appellant and her appeal must be dismissed.

Appellee submits that the construction placed upon RSA 458:5 III by the New Hampshire Supreme Court in the opinion below was not novel, and should therefore have been anticipated by the appellant as controlling in her case.

RSA 458:5 III was similarly construed in the New Hampshire case of Duford v. Duford, 119 NH 515, 403 A.2d 431(1979), as follows:

> RSA 458:5 III provides that jurisdiction over the parties exists "[w]here the plaintiff was domiciled in the state for one year next preceeding the time when the action was commenced." Plaintiff meets this requirement, and service being properly made in accordance with RSA 458:9, personal jurisdiction attaches under RSA 458:5. Federal constitutional requirements, however, must also be met. Shaffer v. Heitner, 433 U.S. 186(1977); International Shoe Co. v. Washington, 326 U.S. 310(1945). The defendant was married in New Hampshire, fathered a child here, and lived in this State with the plaintiff as husband and wife. The record before us shows that New Hampshire is still his domicile, although he may presently be elsewhere.
>
> We have no hesitancy in holding that the defendant has more than the minimum contacts

with this State to satisfy the requirements of International Shoe Co. v. Washington, 326 U.S. 310(1945); See Nickas v. Nickas, 113 NH 261, 306 A.2d 51(1973); cf. Kulko v. Superior Court, 436 U.S. 84,92(1978)(denying in personam jurisdiction in a domestic relations case where the "quality and nature" of the defendant's activities within the forum State were insufficient to make it "reasonable and fair" to require him to subject himself to the forum State's jurisdiction).

This ruling makes the construction of RSA 458:5 III plain: New Hampshire permits utilization of RSA 458:5 III as a source of personal jurisdiction over absent defendants in marital actions as long as federal constitutional requirements are met, as set forth above. In all major respects, as the record shows, the facts of the instant case come within the purview of the holding in Duford, supra.

The opinion in Duford stated that in addition to the defendant's other contacts, i.e. defendant was married, fathered a child, and lived with plaintiff as husband and wife in New Hampshire, the record reflected that New Hampshire was still the ab-

sent defendant's domicile. Similarly, in the instant case, the trial court found that New Hampshire was the appellant's last marital domicile, and that appellant's contacts with New Hampshire were substantial.

Duford did not hold, as appellant contends, that absent defendants are required to be domiciliaries as a prerequisite to personal jurisdiction attaching under RSA 458:5 III, but only that "federal constitutional requirements . . . must also be met." id., at 515, 403 A.2d at 431. In other words, under Duford, domicile is not a controlling factor, but rather is evidence of sufficient contacts with the forum state. Though Duford is distinguishable on this particular fact, as noted above, the distinction is without significance; the instant case still comes within the holding of Duford, as appellant's contacts were found to be sufficient for the exercise of personal jurisdiction over appellant to comport with federal due process requirements.

Thus, since the disposition of appellant's case was clearly controlled by the Duford holding, and therefore not novel, appellant should have anticipated this ruling in her case and attacked RSA 458:5 III as "void for vagueness" prior to her Petition for Rehearing.

In Herndon v. Georgia, 295 U.S. 441,443-446(1935), supra, this Court, in analyzing whether the appellant was entitled to avail herself of the exception to the general rule that "an attempt to raise a federal question after judgment, upon a Petition for Rehearing, comes too late," held that the exception was not available, where the construction given a statute by the State's highest court had, in substance, also been given to the same statute in a decision rendered several months prior, and therefore such decision should have been anticipated. This Court in its holding stated:

> Appellant, of course, cannot plead ignorance of the ruling in the Carr [prior] case, and was therefore bound to antici-

> pate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction. Id., at 446.

Indeed, appellant was not ignorant of the Duford holding. RSA 458:5 III and the Duford ruling were cited by both parties at every stage in the proceedings below. Appellant argued at every turn that Duford was distinguishable because the defendant therein was, in addition to his other contacts, also a domiciliary of New Hampshire. The very vigor with which appellant sought to distinguish Duford is evidence that the New Hampshire Supreme Court ruling in Duford was anticipated by appellant to be controlling.

Moreover, appellant should not be heard to say she "could not reasonably have anticipated" RSA 458:5 III being construed to provide jurisdiction over the appellant, for she framed this question to the New

Hampshire Supreme Court. Thus, it is apparent that the appellant anticipated a ruling on this issue.

The Duford holding is not modified in any substance by the instant case. Even assuming, arguendo, that appellant had cause to raise the "void for vagueness" claim, she had virtually equal cause and sufficient opportunity to raise it prior to her Petition for Rehearing on the basis of the Duford ruling.

Thus, where the appellant failed to attack RSA 458:5 III as being constitutionally infirm in her brief before the New Hampshire Supreme Court, and, the record below is silent on this issue, this Court is without jurisdiction to grant an appeal.

This conclusion is true where the appellant had ample opportunity to raise the issue below, and where the construction of RSA 458:5 III complained of here was not novel and should therefore have been anticipated. Therefore, appellant has failed to meet her burden of showing that she pre-

sented her constitutional issue in a timely fashion and her appeal should be dismissed.

II. The appeal should be dismissed for failure to present a substantial federal issue.

The extension of jurisdiction over the non-resident, non-appearing appellant by the New Hampshire Court to dissolve the parties' marriage and restore the New Hamphsire marital property to the appellee raises no substantial federal issue where the appellant's contacts with the forum were found to be "regular" and "substantial" and the appellant ignored two actual notices of the pending New Hampshire action in order to proceed in New York.

A. New Hampshire's Enabling Authority

The New Hampshire Supreme Court opinion in Duford v. Duford, 119 NH 515,403 A.2d 431(1979) construed RSA 458:5 III to be enabling authority for the exercise of jurisdiction over non-resident defendants in

divorce cases.[17]

Such judicial construction of RSA 458:5 III in Duford, id., and in the instant case, (both of which cases rely upon this construction of the statute) is binding upon this Honorable Court. Albertson v. Millard, 345 U.S. 242,244(1953); Kingsley Pictures Corp. v. Regents, 360 U.S. 684,686(1958); Aero Transit Co. v. Comm'rs, 332 U.S.

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17. Supra, in text at pp. 22, 23. In this context, note that in Leeper v. Leeper, 114 NH 294, 319 A.2d 626(1974) the court stated:

> "When the rules governing jurisdiction were liberalized in International Shoe Co. v. Washington, 326 U.S. 310(1945), and its progeny, this court wholly adopted their rationale and determined that jurisdiction over nonresidents would be exercised to the full constitutional limit. [Citation omitted]. In searching for this constitutional limit, the court has identified two important considerations by which it would test the correctness of a lower court's decision to grant or withhold jurisdiction. First, the exercise of jurisdiction has to be reasonable from the standpoint of New Hampshire's interest in the litigation. Second, it has to be consistent with the principles of fair play and substantial justice."

495,501,502(1947) and cases cited therein. See, Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358,362 (1932). In this context, this Court has stated:

> ". . . we are bound by the decision of that [state] court as though the meaning as fixed by the court had been expressed in the statute itself in specific words. [citations] Guaranty Trust Co. v. Blodgett, 287 U.S. 509,513 (1932).

While RSA 458:5 III on its face purports to allow the courts of New Hampshire to exercise jurisdiction over both parties merely if the plaintiff is domiciled in New Hampshire for one year, the New Hampshire Supreme Court has made expressly clear the requirement that the application of this statute to obtain jurisdiction over non-residents must conform to the requirements of federal due process.

Thus, the language of RSA 458:5 III as a source of authority for obtaining jurisdiction over non-resident defendants in marital cases was expressly narrowed in Duford's

holding to make the application of this statute to non-residents conform to federal constitutional requirements.

Since this judicial construction of RSA 458:5 III is a matter of state law, and well settled, the remaining issue is whether or not the application of RSA 458:5 III in this instance violated federal law. Though this Court is bound by New Hampshire's construction of this statute, this Court's province, of course, is to decide the federal due process questions. See United States v. Burnison, 339 U.S. 87(1950).

A proper resolution of this issue (whether or not New Hampshire had jurisdiction to grant the divorce and dispose of the marital property) requires an examination of the federal due process constraints on the exercise of such state court jurisdiction over non-residents.

B. Federal Constraints

Historically, a state's power to adjudicate was predicated upon notions of "power"

and depended upon the physical presence of the defendant within the territorial limits of the rendering state. Pennoyer v. Neff, 95 U.S. 714(1877).

A state's authority to adjudicate gradually shifted from reliance upon such "mechanical" notions of presence, to a factual analysis that looks to the relationship of the defendant to the forum and makes inquiry into whether it is "reasonable" and "fair" to make the non-resident appear and defend. International Shoe Co. v. Washington, 326 U.S. 310(1945).

Despite the resulting expansion of jurisdiction to reach non-residents (e.g., in interstate contract and tort cases), the territorial limitation of Pennoyer v. Neff, supra, still appeared to obtain in the domestic relations area of the law.[18]

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18. Long-Arm Jurisdiction In Alimony and Custody Cases, 73 Col.L.Rev. 289(1973).

Although long-arm statutes were enacted in the wake of International Shoe to reach non-residents in tort and contract actions, state courts seemed reluctant, in light of the historical context of International Shoe, to apply the rationale of the "transacts any business" or "commits a tortious act" language of the long-arm statutes to claims arising out of the marital relation, and courts were thus unwilling to extend jurisdiction to non-residents in such cases.[19] The anomalous result was, that while a single telephone call in a commercial context was found to enough contact to subject a non-resident to the jurisdiction of the court, see O'Hare International

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19. However, some state courts did so. The first case which appears to have utilized its "long-arm" power in this context is Soule v. Soule, 193 Cal.App.2d 443, 14 Cal. Rptr. 417(1961). The facts in that case are similar to the case at bar. Other states simply amended their long-arm statutes. See Long-Arm Jurisdiction in Alimony and Custody Cases, supra, 73 Col.L.Rev. 289,299 n.83 and accompanying text.

Bank v. Hampton, 437 F.2d 1173(7 Cir. 1971), the presence of significant marital property and a spouse's family in the state did not constitute enough contact to reach a fleeing spouse. See Stanley v. Stanley, 271 A.2d 636(Me. 1970); Mroczynski v. McGrath, 34 I11. 2d 451, 216 N.E. 2d 137(1966).

The only generally judicially recognized way to obtain jurisdiction over an absent spouse, if he or she wasn't still a domiciliary of the rendering state, was to serve him, or her, in hand within the forum state, thus invoking the old Pennoyer v. Neff, supra notions that physical presence was a prerequisite to the perfection of jurisdiction. See Armstrong v. Armstrong, 350 U.S. 568(1955) where it was stated:

> "It has been the constitutional rule in this country, at least since Pennoyer v. Neff, 95 U.S. 714, decided in 1878 that non-residents cannot be subjected to personal judgments without such [in-state] service or appearance."[20]
>
> 350 U.S. at 576

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20. Appellant relies on Armstrong, id., (Footnote continued on next page.)

Indeed, this result still occurred a full ten (10) years after International Shoe was decided. However, the traditional rigid rule requiring physical presence within the state

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(Footnote continued from previous page.)

along with Estin v. Estin, 334 U.S. 541 (1948) and Vanderbilt v. Vanderbilt, 354 U.S. 416(1957) for the proposition that New Hampshire may not exercise jurisdiction over non-residents in marital cases. These cited cases do not apply, however, where the rendering state has a sufficient factual basis for acquiring jurisdiction over the non-resident, as in the instant case. In Estin, supra and Vanderbilt, supra the fleeing spouse (in contrast to the instant case) sought an ex parte divorce in Nevada in which state the stay-at-home wife had never set foot, or had any contact.

Thus, Nevada was found to have no jurisdiction over the absent wife who had never appeared in Nevada. Here, Appellant is the "fleeing" spouse, who has substantial contact with New Hampshire. Armstrong, supra was decided under the Pennoyer v. Neff doctrine of "presence" and that decision relied, in part, on the requirement of "in-state" service of process as a prerequisite to the perfection of jurisdiction, not on the "affiliating circumstances" analysis that now obtains in light of International Shoe and its progeny.

sovereign's territorial limits was gradually eroded to the point where this Court remarked: "a trend is clearly discernable toward expanding the permissable scope of state jurisdiction over foreign corporations and other non-residents." McGee v. International Life Insurance Co., 355 U.S. 220,222(1957).

This trend commenced with International Shoe Co. v. Washington, 326 U.S. 310(1945) and its continuance is apparent in such cases as Hanson v. Denckla, 357 U.S. 235(1958); McGee v. International Life Insurance Co., supra; and Travelers Health Association v. Virginia, 339 U.S. 643(1950).

The emerging basis for assertion of jurisdiction over non-residents generally focused on three related areas: 1) the nature and extent of the defendant's connection with the state;[21] 2) the interest

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21. Hanson v. Denckla, 357 U.S. 235,251,253 (1958).

of the parties in having their claim litigated in a particular forum;[22] 3) the interests of the state in providing the plaintiff with an effective means of redress.[23]

The old notion that "physical presence" is a necessary prerequisite to the exercise of state court jurisdiction over non-residents appears to have been completely eroded.

Finally, in Shaffer v. Heitner, 433 U.S. 186(1977) this Court held:

> "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." id. at 212.
>
> ". . . To the extent that prior decisions are inconsistent with this standard, they are overruled." id., 212, n. 39 (emphasis supplied).

Thus, it now appears to be the rule that each exercise of state court jurisdiction is

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22. McGee v. International Life Ins. Co., 355 U.S. 220,222-24(1957).

23. McGee, id., and Travelers Health Association v. Virginia, 339 U.S. 643 (1950).

subject to the rules of "reasonableness" of International Shoe and its progeny, and that the constitutionality of any particular state court's pronouncement on the issue of whether jurisdiction exists over a non-resident in a particular case must be judicially evaluated in the light of such rule.

This Honorable Court has stated that "like any standard that requires a determination of 'reasonableness' the 'minimum contacts' test of International Shoe is not susceptible of mechanical application; rather, the facts of each such case must be weighed to determine whether the requisite 'affiliating circumstances' are present. Kulko v. California Superior Court, 436 U.S. 84,92(1978), citing Hanson v. Denckla, 357 U.S. 235,246(1958).

C. Appellant's Contacts with New Hampshire

Turning then to the facts of the instant case, it is apparent that the appellant had regular and substantial contact with New Hampshire over the course of her marriage

with the appellee.

The following appears from the record below:

> Initially, the parties met while they were en route to New Hampshire on an airplane. Appellee was returning from sea, while the appellant was in New Hampshire to visit her children who attended private school in Concord, New Hampshire, and who were then attending their regular summer camp in Ossipee, New Hampshire (which camp they attended for five successive summers). During the parties' courtship, the appellant made numerous telephone calls to the appellee here in New Hampshire, corresponded frequently, and continued to make frequent visits to New Hampshire.
>
> Upon appellee's return to sea in 1969, the parties were married in New York. During the two-year period from 1969 to 1971, the appellee spent eleven

months out of each year at sea.[24] Because appellee had conveyed the title of his New Hampshire real property to appellant, she signed a mortgage and note with a New Hampshire bank (although appellee has made every payment).

Appellant, Anna Williams, borrowed money from the Piscataqua Bank of Portsmouth, New Hampshire (where she had both a personal and joint checking account) to furnish the house, and appellant had record title to the MGB sports car recorded in Concord, New Hampshire. Appellant concedes that the above is true, and admits such in her responsive pleadings.

Additionally, appellant spent many months out of every year for eight (8) years of the parties' marriage living

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24. While appellant refers to New York as the "marital domicile", appellee actually spent but a total of two (2) months there.

with appellee in New Hampshire as man and wife.

Although the appellee has made all payments on the loans obtained in New Hampshire, it is apparent that appellant has engaged in numerous financial transactions in New Hampshire arising out of the marital relationship, and that she has record title to both real and personal property in New Hampshire, which property forms the sole subject of the within dispute.

Appellee respectfully submits to this Honorable Court that appellant's contacts with New Hampshire, when viewed in the light of the applicable constitutional standard, are sufficient to support the New Hampshire Court's exercise of jurisdiction over her.

In this regard, this Court has stated:

> "It is essential in each case that there be some act by which the defendant purposely avails [herself] of the privilege of conducting activities within the forum state . . ." Hanson v. Denckla, 357 U.S. 235,253(1958).

New Hampshire has held that cohabitation

invokes the protection of state law. See Nickas v. Nickas, 113 NH 261,265, 306 A.2d 51, 54(1973). Additionally, the parties' holding joint title to property, bank accounts, and a certificate of deposit in a New Hampshire bank is evidence that the appellant further purposely availed herself of conducting activities in New Hampshire, thus invoking the protection of New Hampshire law. Appellant returned to and left New Hampshire, year in, year out, for eight (8) years.

As this Court observed in International Shoe,

> "Applying these standards, the activities carried on in behalf of Appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question."
>
> id., at 320.

Appellant's contacts with New Hampshire, as found by the trial court and upheld by the New Hampshire Supreme Court, likewise were "systematic and continuous."[25]

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25. Footnote on following page.

D. Notice to the Appellant

With respect to the sufficiency of notice to the appellant, this Honorable Court's attention is respectfully directed to Certified Mail Receipt Number 923340, a photocopy of which is appended hereto,[26] which forms a part of record and which was duly signed by the appellant and evidences her actual notice of the pending divorce. (After two attempts at in-hand service had

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25. In her Jurisdictional Statement to this Honorable Court, appellant (p. 62 of Jurisdictional Statement) continues in this Court, as she did before the New Hampshire Supreme Court, to characterize her presence in New Hampshire as "visits." During oral argument on this issue before the New Hampshire Supreme Court, Justice Douglas repeatedly questioned counsel for the appellant on the nature of these "visits." When asked by Justice Douglas if it were true that she spent up to six months out of some years living with appellee as man and wife in New Hampshire, appellant did not answer, but after Chief Justice Grimes repeated the question to counsel for the appellant, counsel responded in effect, "Yes, she did but to find personal jurisdiction on that basis would be a missapplication of the International Shoe doctrine."

26. See appendix, p. A-4.

failed, the New Hampshire Superior Court ordered that appellant was to be served by certified mail, and publication). In addition, a second copy of the divorce libel was sent to appellant's nearest relative, which copy was returned, marked "refused".

At the first hearing, when appellant failed to appear, the court ordered that the hearing be rescheduled, and that a second notice was to be sent. Again, appellant failed to appear.

Appellant then specially appeared twenty-eight days later, and asked that the decree be set aside. At the hearing to set aside the decree, the appellant admitted through her attorney that she had actual notice of the New Hampshire proceeding, but that on the advice of retained New York counsel she was to ignore the New Hampshire proceeding in order to proceed with her subsequently commenced divorce action. The relevant part of the hearing transcript reads as follows:

> "Mr. Kalled [appellant's local counsel] . . .'so, your Honor, essentially she (Anna Williams) tells me the reason why she never came to New Hampshire is that she got advice from the firm of Del Rosso, 11146 Old Country Road, Mineola, New York 15501.
>
> Apparently, the situation is one where there was a race for jurisdiction. There were actions both in New York, and in New Hampshire, and as part of the general advice that Mr. Del Rosso gave to my client, part of which was that she must never appear in the New Hampshire matter . . .'" (See Transcript, pg. 3).

There can be no doubt that the decision of the appellant not to appear in the New Hampshire matter was calculated to derive benefit for the appellant by deliberately seeking more advantageous relief in the New York forum.

The appellant clearly had a duty to appear initially upon receipt of the New Hampshire process, even if such appearance were in the nature of a special appearance to contest the jurisdiction of the Court--the right to file a special appearance is recognized by New Hampshire practice.

Appellant takes issue with the relief granted in light of the relief requested in the libel; however, the libel states in pertinent part:

> "IV. That the parties hereto entered into the marriage each owning substantial assets.
>
> Wherefore . . .
>
> (2) That the financial assets of the parties be restored to the status quo which existed prior to the marriage, and
>
> (3) For such other and further relief as may be just."

It is clear from appellant's response to the libel that she was acutely aware of the property at issue, for her counsel immediately wrote to every company in which appellee owned stock and threatened the transfer agents with suit for "actual and punitive damages" if they released any dividends to the appellee.

Further, and without benefit of any judicial process, appellant, through counsel, wrote the New Hampshire bank where appellee had his account and threatened the

bank with suit if they released funds. Appellant then commenced suit in New York, seeking $100,000.00 in punitive damages against appellee for alleged conversion of marital assets. From appellant's acts, she is estopped to deny her awareness of the scope of the relief sought.

III. The decision below gave full consideration to the issues, decided them correctly, and the result is fair.

Appellee, a 70 year old retired sea captain, sought to terminate his marriage and adjudicate his property interests in his New Hampshire marital property.

Appellant, a woman of independent wealth and a resident of Southampton, New York, would not appear to be heard in New Hampshire, but instead, after the New Hampshire divorce was commenced, immediately brought a separate action for divorce in New York.

Appellee asked the trial court in New Hampshire to restore the parties to the

respective financial conditions that existed before the marriage. (Appellant entered the marriage with assets far in excess of appellee). Appellee sought none of appellant's solely held property in New York or Florida. Indeed, appellant disposed of significant property without accounting to appellee for the proceeds.

Appellant's counsel of long standing handled the transfer of appellee's property into appellant's name--but at no time did appellant reciprocate.

If the New Hampshire decree is overturned, and appellant is thereby allowed to continue with her pending divorce action in New York, under New York title laws, she apparently will be entitled to keep all of her solely held property, and yet, acquire one-half of appellee's New Hampshire property, while appellee would be without a forum in which to litigate his interests.

Indeed, appellant has contacted every company in which appellee owns stock (all of

which stock he brought to the marriage, and some of which was purchased with appellee's hazardous duty pay) and frozen the dividends. Appellee is now living on his seaman's pension, as all of his assets have been tied up in divorce litigation by appellant, while none of her assets have been sought after at all by appellee.

Further, if the New Hampshire decision is overturned on the ground that jurisdiction could not be acquired over appellant, appellant still has a court order purporting to transfer title in rem back to him with respect to the house and all of his personal property. What will become of this aspect of the decree? Further and seemingly (to appellee) endless litigation will ensue.

Appellee should not be forced to go to New York where he has little connection, to defend his New Hampshire property, and defend a suit for $100,000.00 punitive damages based upon "conversion" of marital property.

The New Hampshire Courts had all of these issues presented to them, and the New Hampshire decree effectively ends this controversy. Overturning the New Hampshire Supreme Court, which gave full consideration to the issues and decided them fairly, will lead to further litigation, both in New Hampshire and New York, further court appeals, and result in greatly unjustified deprivation to the appellee.

Upholding the New Hamphsire Supreme Court decree will, it is respectfully submitted, sanction a result that is fair, just and reasonable.

CONCLUSION

For the foregoing reasons, the appeal should be discussed, and/or the petition for a writ of certiorari should be denied.

DATED: January 21, 1982

Respectfully submitted:

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APPENDIX

APPENDIX

NH RSA 458:9 Venue: Notice. All libels for divorce shall be brought in the county in which the parties, or one of them, live, and before the superior court; and the notice of the pendency thereof shall be given to the libelee, personal or otherwise, as the court shall order.

NH RSA 458:5 Over Parties. Jurisdiction of the parties exists in the following cases only:

I. Where both parties were domiciled in the state when the action was commenced.

II. Where the plaintiff was so domiciled and the defendant was personally served with process within the state.

III. Where the plaintiff was domiciled in the state for one year next preceding the time when the action was commenced.

IV. Where the domiciled plaintiff has filed a libel the non-domiciled defendant may have affirmative relief upon filing a cross libel.

SUPERIOR COURT RULES

146. When the residence of the libelee is unknown, the libel shall state the libelee's last known post-office address, and the name and post-office address of some near relative of the libelee, if any, is known to the libelant, and otherwise the name and post-office address of some friend of the libelee, such facts to be verified by the libelant's personal affidavit filed with the libel. Service may then be ordered as follows: there shall be publication in a newspaper published at or nearest the libelee's last known place of residence in this State, if any, and otherwise as the Court may order, the last publicatiion to be at least fourteen days prior to the return dat and in the form prescribed by law, with a statement showing that it is a libel for divorce, and the prayers, if any, relative to the custody of children, alimony, support and other relief; also, the Clerk shall send

by registered or certified mail, with request for a return receipt, a copy of the libel and order attested by him, within seven days after filing, to the libelee and to such relative or friend.

NH RSA 510:4 Nonresident Defendant. Jurisdiction. Any person, who is not an inhabitant of this state, and who in person or through an agen transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state, submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

PS Form 3811 AUG. 1978 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

E1774-79

1. The following service is requested (check one):
- [X] Show to whom and date delivered.....¢
- ☐ Show to whom, date, and address of delivery....¢
- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered.....¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery.$
  (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:

Anna Williams
12 Hamilton Place
Garden City, N.Y.

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	923340	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

Anna Williams

4. DATE OF DELIVERY — POSTMARK

CITY NY FEB 20 1980 USPO

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

☆GPO : 1978- 272-932

A TRUE COPY-ATTEST
CLERK

280 U.S.C. §1257. State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment of the United States Constitution demand that in personam jurisdiction over a person be acquired in order to divest said person of title to personalty and realty located in the forum state in a division of marital property in a divorce action?

2. Is New Hampshire's long-arm statute, RSA 510:4 applicable to give in personam jurisdiction over a non-resident in an action for divorce and distribution of marital property wherein the libelee, a non-resident, nondomiciliary of New Hampshire, was served with a libel for divorce by certified mail and publication in the State of New York and who did not appear generally in the action in person or by attorney and whose property was not attached by any process?

3. Assuming arguendo that RSA 510:4 is applicable to this case,

(a) was libelee accorded due notice of the intent of the libelant to divide all marital property no matter when acquired and not just a return to status quo as existed at the time of the marriage as demanded in the divorce libel; and

(b) does libelee have sufficient contacts with the State of New Hampshire concerning libelant's cause of action for divorce so as to satisfy the constitutional mandate of due process thereby compelling libelee to defend this action in the forum state?

4. If RSA 510:4 does not confer in personam jurisdiction over libelee in this case, does RSA 458:5 in conjunction with 458:9 confer in personam jurisdiction over libelee, a non-resident, non-domiciliary of New Hampshire, who was served by publication and certified mail in New York and who did not appear generally in person or by attorney in the action and whose property was not attached?

5. If there was no New Hampshire statute which conferred in personam jurisdiction over libelee, was the due process clause of the Fourteenth Amendment violated by the Superior Court's divorce decree which in part ordered libelee to convey to libelant her interests in realty and personalty either jointly owned by the parties or owned solely by libelee, all located in the forum state, that is, by certified mail and publication in New York, there being no appearance generally by libelee in the forum in person or by attorney and there being no attachment by any process of the libelee's property located in New Hampshire?